No. 88-801

# In The Supreme Court

OF THE

## United States

OCTOBER TERM, 1988

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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VSL CORPORATION, INC., et al.,
*Petitioners,*

vs.

CONMAR CORPORATION, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a plaintiff will be charged with constructive knowledge of facts in the public record, here defendant VSL's prior guilty plea to criminal charges on which plaintiff's antitrust claims were later based, so as to preclude a claim of fraudulent concealment when those facts would have put the plaintiff on notice of its claims or when those facts should have excited plaintiff's suspicion thereby requiring the exercise of due diligence by plaintiff in discovering its claims.

2. Whether an antitrust plaintiff can invoke the doctrine of fraudulent concealment to toll the four-year statute of limitations under Section 4B of the Clayton Act, when the only act of concealment, apart from the alleged antitrust conspiracy itself, is an equivocal denial of wrongdoing by the defendant of which the plaintiff was ignorant.

## LIST OF PARTIES

Petitioners are Mitsui & Company (U.S.A.), Inc., Mitsui Bussan Kabushiki Kaisha, VSL Corporation, Inc., Shinko Wire Co., Ltd., and Losinger AG.

Respondents are Conmar Corporation, L.R. Yegge Company, and Lawrence R. Yegge.

Petitioners and Respondents are the same parties as in the proceeding below.[1]

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[1]The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners are:

*VSL Corporation and Losinger AG:* VSL is a wholly owned subsidiary of Losinger AG. Losinger AG is 50% owned by Ensearch Corporation.

*Shinko Wire Co., Ltd.:* Kobe Steel, Ltd. is the parent corporation and Shinko Wire America, Inc. is the subsidiary of Shinko Wire Co., Ltd.

*Mitsui & Co. (U.S.A.), Inc. and Mitsui Bussan Kabushiki Kaisha:* Mitsui & Co. (U.S.A.), Inc. is a wholly owned subsidiary of Mitsui Bussan Kabushiki Kaisha. The following are affiliates and subsidiaries of Mitsui & Co. (U.S.A.) Inc.: Gain Electronics Corp., Hannibal Industries, Inc., Hino Motors (U.S.A.), Inc., Mitsui Seiki (U.S.A.), Inc., Mitsui Yoshioka de Brazil, S.A., Nymitech, Inc., Red-White Valve Corp., Seedex, Inc., TCM America (MBK Inc.), Van Brunt Fort Jersey Warehouse, Inc., Weisner Steel Products, Inc.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, dated September 27, 1988 and amended October 24, 1988, is Appendix A at pages A-1 through A-14. The order of the District Court granting defendants' motion for summary judgment is Appendix B at pages B-1 through B-4.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 27, 1988. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 4B of the Clayton Act, 15 U.S.C. § 15b:

> § 15b. Limitations of actions
>
> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.
>
> (As amended Sept. 30, 1976, Pub.L. 94-435, Title III, § 302(1), 90 Stat. 1396.)

## STATEMENT OF THE CASE

### A. Background

Respondents Conmar Corporation and L.R. Yegge Co. are contractors who post-tension concrete. Respondent Lawrence R. Yegge is the president of both companies. Concrete is post-tensioned to obtain greater strength and improve structural characteristics by stretching previously inserted steel wire strands (PC-Strand) after the poured concrete is hardened. Petitioners Mitsui & Company (U.S.A.), Inc. and Mitsui Bussan Kabushiki Kaisha (collectively "Mitsui") imported into the United States products that Petitioner Shinko Wire Co., Ltd. ("Shinko") manufactured, including PC-Strand. Petitioner VSL Corporation ("VSL") is a competitor of Respondents and a wholly-owned subsidiary of Petitioner Losinger AG ("Losinger").

On July 21, 1986, Respondents filed suit in the District Court alleging that Petitioners conspired to restrain trade and commerce in, and monopolize, the market for

post-tensioning of concrete structures, in violation of federal antitrust laws. The substance of Respondents' allegations was that VSL obtained PC-Strand from Mitsui at illegally low prices in a conspiracy to violate dumping laws, and that the low prices allowed VSL to submit low bids for post-tensioning jobs, in conspiracy with Mitsui to suppress competition in the industry.

Respondents' Complaint alleged that the conspiracy among Petitioners, to restrain competition and monopolize the industry, took place between 1977 and June 1981. Such antitrust actions are subject to a four-year statute of limitations under the Clayton Act. 15 U.S.C. § 15(b) (1982). Respondents admittedly filed their action more that four years after the end of the alleged antitrust conspiracy and relied on the doctrine of fraudulent concealment to toll the statute of limitations on their claims.

The District Court possessed jurisdiction over this action containing antitrust and related claims pursuant to 28 U.S.C. §§ 1331 and 1337, 15 U.S.C. § 15, and its general pendant jurisdiction. On July 28, 1987, the District Court entered summary judgment in favor of Petitioners on the grounds that the statute of limitations had run.[2] The Ninth Circuit Court of Appeals, possessing appellate jurisdiction pursuant to 28 U.S.C. § 1291, reversed the summary judgment in its opinion filed on September 27, 1988, and amended on October 24, 1988, on the grounds that there were genuine issues of material fact whether the fraudulent concealment doctrine applied to save Respondents' otherwise untimely action.

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[2]The judgment entered by the District Court on July 28, 1987, did not include Petitioner Losinger as a party to the judgment. That judgment was amended on August 14, 1987, to include Losinger.

Throughout 1981, Mitsui, and certain Mitsui customers, including VSL, were the subject of an extensive, publicized investigation by the United States Customs Service and the United States Attorneys in San Francisco, which investigation was the subject of a number of public filings in federal court. More specifically, that investigation led to the following events:

1. On December 2, 1980, the Customs Service applied for a search warrant of Mitsui's offices in San Francisco, on suspicion of evidence of the "dumping" of Japanese steel products imported by Mitsui. (Clerk's Record ("CR"); Ex. O, p. 1.) The search and seizure of Mitsui records took place in early December, 1980, and the customs investigation was reported in the media during January, 1981. The media coverage disclosed that a grand jury was investigating the dumping of steel products, including PC-Strand, by Mitsui, allegedly facilitated by Mitsui's use of false customs reports. (CR-16, Exs. A-1 through A-3, B-1 through B-3, C-1, C-2, D-1, E-1, G-1.)

2. The affidavit of Special Agent Thomas Yasueda in support of the Customs Service application for the December 2, 1980 search warrant was unsealed on March 23, 1981, and became a public document. (CR-16, Ex. O, p. 2.) Although certain names contained in the affidavit were redacted, its contents were widely reported in the media, including the fact that PC-Strand was one of the products allegedly dumped by Mitsui through the use of false customs filings. (CR-16, Exs. A-4, B-4, B-5, C-3, D-2, E-2, F, G-2, I, K, R, S.)

3. On June 30, 1981, an indictment was filed charging a Mitsui employee and a Mitsui customer with filing false customs reports to facilitate the dumping of Japanese steel nails. *United States v. Pacific Steel and Supply, et al.*, No. CR-81-000236 MHP (N.D. Cal., filed June 30, 1981).

Media coverage of the indictment reported that the case was related to the ongoing investigation of Mitsui and other steel products. (CR-16, Exs. A-6, B-6, B-7, D-3, G-3, H.)

4. In January, 1982, a criminal information was filed against VSL, and VSL pleaded guilty to charges that it aided and abetted a scheme to file false customs reports regarding the true price of PC-Strand purchased by VSL. *United States v. VSL Corp.*, No. CR-82-00001 MHP (N.D. Cal., filed January 5, 1982). Media coverage of the VSL guilty plea reported the relationship between the VSL plea and the ongoing investigation of Mitsui. (CR-16, Ex. M.)

5. Mitsui was indicted on July 20, 1982, and pleaded guilty to charges that it participated in a scheme to file false customs reports to facilitate the dumping of Japanese steel products, including PC-Strand. *United States v. Mitsui & Co. (U.S.A.), Inc.*, No. CR-82-00410 MHP (N.D. Cal., filed July 20, 1982).

6. On December 3, 1982, Western Concrete Structures, a post-tensioning company, filed a complaint against Petitioners alleging essentially the same claims of conspiracy to restrain and monopolize the post-tensioning industry as are contained in Respondents' Complaint herein. *Western Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc.*, No. C-82-6628 MHP (N.D. Cal., filed December 3, 1982).

7. Respondents filed the instant suit against Petitioners in the District Court on July 21, 1986.[3] Respondents'

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[3]The complaint was initially filed in the Eastern District of California by Lawrence R. Yegge and L.R. Yegge Co. Conmar, which had filed bankruptcy under Chapter 11 on September 3, 1985, was added as a plaintiff after its claims were abandoned by the bankruptcy

Complaint asserts that the cost of PC-Strand is virtually determinative of a post-tensioning company's ability to compete (CR-5, at ¶ 24), and also alleges that the antitrust conspiracy is grounded in the same facts as VSL's prior guilty plea. In the Second Amended Complaint Respondents set out the alleged antitrust conspiracy in paragraphs 30-33 and then allege: "VSL has pleaded guilty to criminal charges alleging, in substance, the facts as set out in Paragraphs 30 through 33." (CR-5, at ¶ 34.)

8. Respondent Lawrence R. Yegge acknowledged in his declaration filed in opposition to Petitioners' motion for summary judgment that he had not seen *any* of the newspaper articles reporting the government investigation or federal filings, prior to 1986. (CR-20, at ¶ 13.) Yegge further admitted in his declaration that prior to 1986 he had no knowledge that VSL had used Mitsui-imported PC-strand on jobs in which VSL had competed against Respondents. (CR-20, at ¶ 15.)

## B. The Proceedings in the District Court

On July 28, 1987, Petitioners' motion for summary judgment was granted by the District Court, which held that Respondents' action was barred by the four year statute of limitations under Section 4B of the Clayton Act. Because the alleged conspiracy admittedly ended more than four years prior to the filing of the Complaint, the only issue was whether Respondents could invoke the doctrine of fraudulent concealment to toll the limitations period.

Recognizing that "the means of knowledge are the same thing as knowledge itself," the District Court found

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estate to Yegge. The action was transferred to the Northern District in February, 1987, after Petitioners' motion to transfer was granted.

that the means of knowledge were available to Respondents no later than June of 1981. (B-3.) The court found that "the facts allegedly concealed were available in public records", and that Respondents were "charged with knowledge of public records" under *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) and *Maughan v. S.W. Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985). (B-3.)

The District Court then held that Respondents' claims were barred because, after having been put on notice of facts that "should have excited their inquiry," Respondents failed to demonstrate "that they investigated with reasonable diligence and discovered nothing that would have justified their filing suit earlier." (B-2, B-4.) Instead, the District Court found that the record "does not contain any evidence of the kind of facts necessary to persuade a trier of fact that due diligence was used. . ." (B-4.)

### C. The Decision of the Ninth Circuit

The United States Court of Appeals for the Ninth Circuit reversed the grant of summary judgment, holding that material issues of fact existed as to each of the three elements of Respondents' fraudulent concealment claim: (1) whether Respondents had constructive notice of their claims prior to July 20, 1982; (2) whether Respondents' suspicions should have been excited prior to July 20, 1982; and (3) whether there was concealment by Petitioners.

The Ninth Circuit stated:

> "The central question, however, is not whether [Respondents] had actual knowledge of [their] antitrust cause of action, but whether before July 20, 1982, [they] should have been alerted to facts that,

> following duly diligent inquiry, could have advised [them] of their claim. *See Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) ("Any fact that should excite his suspicion is the same as actual knowledge of his entire claim."). (A-6.)

The Ninth Circuit agreed with the District Court that "[t]he record does not show any inquiry by [Respondents] after [June of 1981]." (A-12.) However, the Ninth Circuit held that no due diligence was required because a genuine issue of material fact existed as to "whether the facts publicly available were sufficient to excite [Respondents'] inquiry." (A-12.)[4]

On the concealment element, the Ninth Circuit rejected Respondents' argument that a "self-concealing conspiracy" could toll the limitations period. (A-12.) The court held that

> "[a] plaintiff alleging fraudulent concealment must establish that its failure to have notice of its claim was the result of affirmative conduct by the defendant." (A-12.)

The court then identified two means by which Respondents could prove affirmative acts of concealment by Petitioners. First, the court held that Petitioners' alleged creation of customs and other documents falsely reporting PC-Strand prices could constitute affirmative acts of concealment. (A-13.)

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[4]The Ninth Circuit further held that a genuine issue of material fact existed as to whether a greater quantum of information, sufficient to put respondents on notice of their antitrust claims, was available before July of 1982. (A-11.) In so holding, the Court relied on Respondents' assertion that they were not aware that Mitsui supplied PC-Strand to VSL. (A-10.)

Second, citing *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978), the Ninth Circuit held that "[a]n affirmative act of denial . . . is enough if the circumstances make the plaintiff's reliance on the denial reasonable." (A-12-13.) As the "affirmative act of denial" the court identified a newspaper article in which a Mitsui representative stated that the customs investigation was based on a misunderstanding and misinterpretation of customs regulations. (A-13.) The Ninth Circuit then held that it would not have been unreasonable for Respondents to have relied on that statement, notwithstanding the fact that Respondents denied being aware of the article in which the statement appeared. (A-6, A-13.)

## REASONS FOR GRANTING THE WRIT

### I.

### THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER COURTS OF APPEALS ON FUNDAMENTAL AND FREQUENTLY LITIGATED ASPECTS OF THE DOCTRINE OF FRAUDULENT CONCEALMENT

This case presents an opportunity, on a limited and essentially undisputed record, for this Court to provide meaningful guidance to the lower courts on the subject of fraudulent concealment. This case illuminates conflicts among the circuits that impact each of the three commonly articulated elements of the fraudulent concealment doctrine: (1) concealment by the defendant; (2) plaintiff's lack of actual or constructive knowledge of its claims; and (3) plaintiff's due diligence in uncovering its claims.[5]

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[5]The courts of appeals do not entirely agree on even these basic elements of the fraudulent concealment doctrine. The Ninth Circuit,

### A. The Decision Below is in Conflict With Other Circuits Which Have Charged Plaintiffs With Constructive Knowledge of Facts in the Public Record

The limitations period ceases to be tolled under the fraudulent concealment doctrine when the plaintiff has knowledge of its claims, or when, in the exercise of due diligence, it should have knowledge of its claims, even though it does not. As this Court stated in *Wood v. Carpenter*, "[t]here must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself." 101 U.S. 135, 143 (1879). Thus, a plaintiff cannot invoke fraudulent concealment to toll the limitations period under Section 4B of the Clayton Act if charged with knowledge of its claims, or of facts sufficient to excite inquiry, more than four years prior to the filing of the complaint.

In January 1982, four and one-half years before Respondents filed their complaint, Respondents' competitor, VSL, pleaded guilty to the criminal information charging

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in the opinion below, held that the plaintiff's diligence is only relevant if the plaintiff is first put on notice of facts sufficient to excite suspicion. (A-12.) Other courts of appeals have suggested that a plaintiff must *always* show his due diligence. *See Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 234 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974). Still other courts of appeals have suggested that "due diligence" is simply part of the inquiry into plaintiff's constructive knowledge, and is not a separate element of the doctrine. *See King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982). Finally, the Court of Appeals for the District of Columbia has held that once the plaintiff shows concealment by the defendant, the burden shifts to the defendant to show the plaintiff's lack of due diligence. *See Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). In addition, the courts of appeals have differed on whether a "self-concealing conspiracy" can constitute fraudulent concealment. *See* n. 9, *infra*, at p. 15.

it with aiding and abetting the submission of false documents to the Customs Service in connection with the importation of PC-Strand. Because Respondents' Complaint expressly acknowledges that the VSL guilty plea concerned the same facts as the alleged antitrust conspiracy, it cannot be disputed that the facts in the VSL guilty plea were either sufficient to put Respondents on notice of their antitrust claims, or were at least sufficient to arouse Respondents' suspicion.[6] In either case, the decision of the Ninth Circuit upholding Respondents' fraudulent concealment defense cannot be sustained if Respondents are charged with knowledge of VSL's guilty plea to the criminal information.[7]

In deciding that Respondents did not have notice of facts sufficient to apprise them of their claims or excite their suspicions, the Ninth Circuit focused its discussion on the sufficiency of the *publicity* surrounding the government investigation and the filings in federal court, but basically ignored the fact of the investigation and the filings themselves. The publicity is beside the point. Respondents can only invoke fraudulent concealment to toll the limitations period if they are not directly charged with knowledge of the VSL criminal information and guilty plea, and the Yasueda affidavit, because those were matters of public record.

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[6]Respondents' complaint also acknowledges that the same facts were alleged in Mitsui's indictment on July 20, 1982. (CR-5, at ¶ 35.)

[7]The Ninth Circuit acknowledged that "[t]he record does not show any inquiry by [Respondents] after [June of 1981]." (A-12.) Therefore, if the VSL guilty plea should have excited Respondents' suspicion, then Respondents' failure to make any diligent inquiry would preclude tolling of the limitations period through fraudulent concealment.

The Ninth Circuit's failure to charge Respondents with constructive knowledge of the VSL guilty plea and the Yasueda affidavit creates a conflict with decisions in the Second, Fourth, Fifth, Sixth, and Eighth Circuits. Each of those circuits has held that a plaintiff will be charged with constructive knowledge of matters of public record for purposes of the doctrine of fraudulent concealment.

In *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975), the Sixth Circuit relied on this Court's holding in *Wood v. Carpenter* that "the means of knowledge are the same thing in effect as knowledge itself," and held that "[a]ny fact that should excite [plaintiff's] suspicion is the same as actual knowledge of his entire claim." *Id.* at 394. The Sixth Circuit then held that the plaintiff could not claim fraudulent concealment of its antitrust causes of action, because it was charged with constructive knowledge of congressional hearings that should have aroused its suspicions:

> "As the district court held, the congressional proceedings should have aroused [plaintiff's] suspicions, and its failure to investigate further at that time was not the exercise of due diligence required in order to employ the fraudulent concealment doctrine to avoid the bar of the statute of limitations."

*Id.*

In a private antitrust damage action, the Fifth Circuit held that the plaintiffs were charged with knowledge of antitrust allegations contained in another complaint which should have excited inquiry. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1170-1171 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). After noting that "[n]umerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public

records," *id.* at 1170, the court held that "[t]he widely publicized [other] complaint certainly put these plaintiffs to a duty to investigate." *Id.* at 1171. The Fifth Circuit reaffirmed that "plaintiffs are chargeable with knowledge of the contents of public records" in *United Klans of America v. McGovern,* 621 F.2d 152 (5th Cir. 1980), the court holding that fraudulent concealment could not be invoked because the plaintiff was charged with knowledge of a Senate report which should have excited inquiry. *Id.* at 155.

In another private antitrust action, the Fourth Circuit rejected the plaintiff's attempt to invoke the fraudulent concealment doctrine, because the facts allegedly concealed were available in public mining records. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211, 218 (4th Cir. 1987).

The Second Circuit rejected an attempt to invoke fraudulent concealment in a private federal securities action where facts that should have put the plaintiffs on inquiry were available in S.E.C. and New York Stock Exchange releases. *Arneil v. Ramsey,* 550 F.2d 774, 781 (2d Cir. 1977). Similar to the instant case, the plaintiffs' complaint in *Arneil* stated that the facts upon which its claims were based where contained in these public documents. *Id.*

In *Willmar Poultry Co. v. Morton-Norwich Products, Inc.,* 520 F.2d 289 (8th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976), the Eighth Circuit rejected a claim of fraudulent concealment where the facts allegedly concealed where available in a Tariff Commission report and in public testimony before that commission. *Id.* at 295-296.[8]

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[8]*See also, Maughan v. S.W. Servicing, Inc.,* 758 F.2d 1381, 1388 (10th Cir. 1985) ("When the claim is one of concealment and the very

This Court's opinion in *Wood v. Carpenter*, that the means of knowledge are the same as knowledge itself, mandates charging plaintiffs with constructive knowledge of matters of public record. Plaintiffs should not be allowed to make essentially unchallengeable claims of ignorance of public records (the "means of knowledge") either to avoid constructive knowledge of their claims, or the inquiry notice that would trigger a duty of diligence in uncovering their claims. When the facts which exist to excite inquiry or reveal claims are matters of public record, *constructive* knowledge becomes the only workable standard, since only rarely will there be any evidence of the plaintiff's actual knowledge of matters of public record.

### B. The Decision Below is in Conflict With Other Circuits Which Have Held That a Defendant's Denial of Wrongdoing Does Not Constitute Concealment

Ever since this Court's opinion in *Wood v. Carpenter* it has been clear that affirmative acts of concealment by the defendant are necessary to a fraudulent concealment claim:

> "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

101 U.S. 135, 143 (1879).

The Ninth Circuit held that Respondents could meet their burden of showing that ignorance of their claims was based on Petitioners' affirmative acts of concealment by two means: (1) by showing that Mitsui submitted false

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facts allegedly concealed are available in public records, the argument that the plaintiffs should, as a matter of law, be held to constructive knowledge of their cause of action is much stronger").

documents to the Customs Service,[9] and (2) by reliance on a newspaper article quoting a Mitsui representative's reaction to the customs investigation, which the Ninth Circuit construed as a "direct public denial of any wrongdoing." (A-13.)[10]

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[9]Respondents could not themselves have been misled by any false customs documents relating to Mitsui/VSL transactions, because Respondents contended that they were unaware of the customs submissions, and more fundamentally, were unaware that it was Mitsui that supplied PC-Strand to VSL. (A-10.) Thus, the Ninth Circuit's assertion to the contrary notwithstanding, this case squarely presents the issue of whether a conspiracy can be "self-concealing" to toll the limitation period, or whether "affirmative acts" of concealment aimed at, and perceived by, the plaintiff, apart from the alleged overt acts constituting the conspiracy, are necessary. Other antitrust conspiracy cases in the courts of appeals that have purported to address the self-concealing conspiracy argument have contained acts of concealment directly aimed at misleading the plaintiff. *Compare New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2d Cir. 1988) (bid-rigging conspiracy held to be inherently "self-concealing" to toll the limitations period; defendants submitted false non-collusion affidavits to the plaintiff), *cert. denied*, 57 U.S.L.W. 3235 (U.S. October 3, 1988) (No. 88-21); *with Texas v. Allan Construction Co., Inc.*, 851 F.2d 1526 (5th Cir. 1988) (rejecting the argument that a bid rigging conspiracy is inherently self-concealing, but finding "affirmative acts" of concealment in the submission of false non-collusion affidavits to the plaintiff). This case, in contrast, presents a conspiracy where the acts of concealment were aimed at avoiding detection by the *government*, the obvious aim of *all* illegal conduct, and a significant extension of the fraudulent concealment doctrine.

[10]Contrary to the Ninth Circuit's characterization, the statement quoted in the article was equivocal at best. The article stated, in relevant part:

> "Former employees of Mitsui & Co. (U.S.A.), Inc., claim the company falsified U.S. customs forms, used double invoices, allowed false damage claims, and misused money exchange rates to conceal illegal rebates to steel buyers.

The Ninth Circuit's holding that Respondents could rely upon Mitsui's denial of wrongdoing to establish the active concealment element of their fraudulent concealment claim accentuates an existing conflict among the circuits. The Sixth and Tenth Circuits have held that a denial of wrongdoing does not constitute concealment.

In *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982), the Tenth Circuit quoted approvingly the district court's statement of the law that "[a] denial of an accusation of wrongdoing does not constitute fraudulent concealment." *Id.* at 1155. The district court had so held, citing *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F. Supp. 546, 549 (N.D. Ohio 1974), *aff'd*, 523 F.2d 389 (6th Cir. 1975), in rejecting the plaintiff's argument that affirmative acts of concealment could be shown by the defendants' denial, in deposition testimony, that they had

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But Junichi Amano, Vice President and General Manager of Mitsui's San Francisco office, said *a preliminary review of the charges 'indicates much of it is based on a distortion or misunderstanding of the facts and a misinterpretation of antidumping regulations.'* " *See* CR-16, Ex. A-5 (Emphasis added).

Nowhere is there a direct denial of the charges referred to in the article.

Moreover, the Mitsui "denial" that the Ninth Circuit relied upon as providing the factual basis for Respondents' ~~claim~~ of active concealment, was contained in a newspaper article which Respondents claimed to have never seen. *See* CR-16, Ex. A-5; CR-20, at ¶ 13. Indeed, the Ninth Circuit apparently accepted and relied upon Respondents' asserted ignorance of *all* publicity concerning the Mitsui customs fraud investigation in reaching its conclusion that there was a material issue of fact whether Respondents knew or should have known of the facts upon which its claim was based prior to July 20, 1982. (A-6.) Thus, Respondents' ignorance of its claims could not have resulted from the "denial."

engaged in any illegal price fixing activities. 446 F. Supp. at 912.

The Sixth Circuit in *Dayco* affirmed the district court's ruling, on summary judgment, that defendants could not invoke fraudulent concealment to toll the limitations period on their antitrust claims. The district court had considered a statement by one of defendant's officers, "that he did not believe that price cuts could be effectively concealed," and held that "[e]ven if this were construed as an active denial of illegal conduct by [defendant], 'a denial of an accusation of wrongdoing . . . was not a fraudulent concealment.' " 386 F. Supp at 549.[11]

In conflict with the Sixth and Tenth Circuits, the Fifth and Ninth Circuits have held that a denial of wrongdoing may constitute concealment. The Fifth Circuit recently held, in *Texas v. Allan Construction Co.*, 851 F.2d 1526 (5th Cir. 1988), that a denial of wrongdoing "may constitute concealment where the parties are in a fiduciary relationship, or where the circumstances indicate that it was reasonable for the plaintiff to rely on defendant's denial." *Id.* at 1532-33. The Ninth Circuit's decision in *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978), cited by both the court below and the Fifth Circuit in *Allan Construction*, similarly held that a denial of wrongdoing may constitute fraudulent concealment under circumstances making the plaintiff's reliance on the denial reasonable. *Id.* at 250.[12]

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[11]The district court in *Dayco* quoted *Suckow Borax Mines Consol. v. Borax Consolidated, Ltd.*, 185 F.2d 196, 209 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951), which points up the confusion in this area. *Suckow Borax Mines* was not cited by the Ninth Circuit in either *Rutledge, infra,* or in the decision below.

[12]The First Circuit has also quoted approvingly the Ninth Circuit's language in *Rutledge* regarding denials of wrongdoing. *Berkson v. Del*

The decisions of the Fifth and Ninth Circuits threaten to expand the fraudulent concealment exception to the point where it will swallow statutes of limitations entirely.[13] Every defendant can be expected to deny wrongdoing, and there exists no principled distinction between such a denial and the failure to spontaneously own up to wrongful conduct. A denial of wrongdoing, absent any accompanying false statements of fact intended to affirmatively mislead the plaintiff, amounts to nothing more

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*Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985). However, the First Circuit did not expressly address this issue in its opinion.

[13]The conflict in the courts of appeals has led to haphazard and conflicting results in the district courts. *Compare Colorado ex rel. Woodward v. Western Paving Construction Co.*, 630 F. Supp. 206, 210 (D. Colo. 1986), *aff'd by equally divided court, en banc*, 841 F.2d 1025 (10th Cir. 1988) ("The courts, including the Tenth Circuit, have universally held that denial of wrongdoing does not constitute fraudulent concealment"); *In re Fertilizer Antitrust Litigation*; 1979-2 Trade Cases (CCH) ¶ 62,894 at p. 79,179 (E.D. Wash. 1979) ("non-collusion affidavits . . . amount to no more than a denial of wrongdoing, which does not constitute fraudulent concealment"); *Stegeman v. Aetna Insurance Co.*, 1980-1 Trade Cases (CCH) ¶ 63,256 at p. 78,259 (E.D. Mich. 1980) ("it is well established that a denial of an accusation of wrongdoing does not constitute fraudulent concealment"); *Peck v. United States*, 470 F. Supp. 1003, 1019 (S.D.N.Y. 1979) (same); *Campbell v. Upjohn Co.*, 498 F. Supp. 722, 728 (W.D. Mich. 1980) (absent fiduciary relationship the mere denial of wrongdoing does not constitute fraudulent concealment), *aff'd*, 676 F.2d 1122 (6th Cir. 1982); *with Atchison, Topeka and Santa Fe Ry. v. Chevron U.S.A. Inc.*, available on WESTLAW, 1985 WL 2265 (N.D. Ill. 1985) ("the affirmative act of denying wrongdoing may constitute fraudulent concealment where the circumstances make the plaintiff's reliance upon the denial reasonable") *Clow Corp. v. Witco Chemical Corp.*, 1984-2 Trade Cases ¶ 66,266 at p. 67,161 (N.D. Ill. 1984) (denial of wrongdoing does not constitute fraudulent concealment absent fiduciary relationship or special circumstances making reliance reasonable).

than silence on the part of the defendant. This Court's holding in *Wood v. Carpenter, supra*, has made it clear that silence does not constitute fraudulent concealment.

## II.

## BECAUSE OF THE PERVASIVENESS OF FRAUDULENT CONCEALMENT ISSUES IN THE FEDERAL COURTS THIS COURT SHOULD CLARIFY THE DOCTRINE TO ELIMINATE INCONSISTENCIES IN ITS INTERPRETATION AND APPLICATION

The fraudulent concealment doctrine is an important and frequently raised issue in federal litigation, particularly in antitrust cases.[14] It has been observed that it is now "common practice" to include allegations of fraudulent concealment in private antitrust complaints. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 511 (1979). Further, the frequency with which the issue is raised has increased dramatically in recent years. *See* Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829, 833, n.31 (1983) (from 1975 through 1981 there were nearly twice as many such cases in the federal courts of appeals and district courts as during the 30 years before that).[15]

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[14]Already this term, this Court has denied petitions for writ of certiorari in two antitrust cases raising the issue of fraudulent concealment: *New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3235 (U.S. October 3, 1988) (No. 88-21), and *Colorado ex rel. Woodard v. Western Paving Construction Co.*, 841 F.2d 1025 (10th Cir. 1988) (en banc), *cert. denied*, 57 U.S.L.W. 3235 (U.S. October 3, 1988) (No. 87-2027).

[15]Professor Marcus used LEXIS computerized research to determine the number of reported cases in which the fraudulent concealment doctrine was invoked. Although the LEXIS search unavoidably included some irrelevant cases, and excluded relevant ones, it re-

*See also Norton-Children's Hospitals, Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 445 (6th Cir. 1981) ("The cases that have applied this [tolling] principle to antitrust cases . . . are too numerous to require citation").

Despite the recent explosion in the number of cases in which plaintiffs seek to invoke fraudulent concealment to toll a limitations period, the doctrine has defied uniformity of interpretation or application. The confusion in the courts of appeals has left district court judges with little meaningful guidance in the doctrine's application. As Professor Marcus has observed:

> "Left to themselves to decide an increasing number of fraudulent concealment cases, lower courts rarely analyze the rules governing the application of the doctrine and often state conclusions without explaining them. Given the ad hoc approach of the lower courts, haphazard results have been almost inevitable, causing some district judges to complain that they cannot discern proper standards for application of the doctrine."

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ported 308 cases in the federal courts of appeals and district courts from 1975 through 1981. Petitioners' repetition of the same LEXIS research revealed 599 more cases since 1982.

Petitioners alternatively conducted a WESTLAW computerized search: di(fraudulent /5 concealment) & statute /5 limitations. That research revealed 121 cases in the federal courts of appeals and district courts from 1975 through 1981, and 224 more cases since 1982. That number contrasts with only 113 such cases in the 30 years between 1945 and 1975. The WESTLAW search was further narrowed by adding: & di(antitrust). That latter search revealed 29 cases since 1982, 13 of those in the courts of appeals, confirming that antitrust cases account for a substantial portion of the federal cases in which the issue of fraudulent concealment is raised.

Marcus, *supra*, at 833-834. *See also* Comment, *The Application of the Doctrine of Fraudulent Concealment to Modern Federal Trade Conspiracy Cases*, 14 Conn. L. Rev. 115, 116 (1981) (the formulation of the doctrine in the federal courts has resulted in inconsistent and illogical applications); Comment, *Intent to Conceal: Tolling the Antitrust Statute of Limitations Under the Fraudulent Concealment Doctrine*, 64 Geo. L.J. 791, 797-798 (1976) (inconsistent application of the affirmative acts requirement limits the fraudulent concealment doctrine's usefulness).

The fraudulent concealment doctrine can be expected to play an increasingly prominent, time-consuming, and expensive role in federal litigation, because of the dispositive effect of a successful statute of limitations defense. That role can only be exacerbated by the confusion among the courts of appeals as to the elements of the doctrine.

### A. The Conflicts in the Courts of Appeals Have Undermined Congress' Purposes of Repose, Uniformity, and Elimination of Forum Shopping in Enacting the Statute of Limitations in Section 4B of the Clayton Act

The disparity in interpretation of the fraudulent concealment doctrine has eroded the very policies of uniformity, elimination of forum shopping, and repose which Congress intended in enacting the four-year limitations period for private treble damage antitrust actions. Prior to the enactment of Section 4B in 1955, state statutes of limitations were resorted to in private antitrust actions under the Clayton Act. *See Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961). Congress passed Section 4B of the Clayton Act to prevent forum shopping that resulted from the disparity in state statutes of limitations, a problem particularly in antitrust cases where the injury may have

occurred in a number of states. *See* S. Rep. No. 619, 84th Cong., 1st Sess. 4 (1955), *reprinted in* 1955 U.S. Code Cong. & Ad. News 2328, 2330-31; Stewart, *The Government Suspension Provision of the Clayton Act's Statute of Limitations: For Whom Does it Toll?*, 60 St. John's L. Rev. 70, n.1 (1985); Kirkham, *supra*, at 508, n.43; Comment, *Fraudulent Concealment as Tolling the Antitrust Statute of Limitations*, 36 Fordham L. Rev. 328, n.4 (1967). Congress also clearly intended to further a policy of repose in antitrust suits by guaranteeing uniformity in the limitations period. S. Rep. No. 619, *supra*, at 2330-31; Kirkham, *supra*, at 508, n.44.

This Court recently emphasized the practical importance of a uniform statute of limitations when it held that the four-year statute of limitations under Section 4B of the Clayton Act, rather than state statutes of limitations, should be applied in RICO civil enforcement actions. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, ____ U.S. ____, 107 S.Ct. 2759 (1987). Because RICO cases commonly involve interstate transactions, and, thus, there is the possibility that a multiplicity of state limitations might apply, this Court noted in *Agency Holding* that the use of state statutes "would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex expensive litigation over what should be a straightforward matter.' " 107 S.Ct. at 2766 (quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 391, 392 (1985)). Further, this Court stated:

> "[A] uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' . . . This uncertainty has real-world consequences to both plaintiffs and defendants . . . 'Plaintiffs may be denied their just remedy if they delay in

> filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.' "

*Id.* at 2764 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272, 275, n.34 (1985)).

These same compelling practicalities, largely recognized by Congress in enacting Section 4B, are implicated by the conflicting and haphazard application of the fraudulent concealment exception to federal statutes of limitations. This case presents an opportunity to resolve conflicts among the circuits concerning the fraudulent concealment doctrine and avoid the proliferation of litigation on this issue in the federal courts of appeals and district courts.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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## APPENDIX A.

### Ninth Circuit's Opinion Below

United States Court of Appeals, Ninth Circuit.

Conmar Corporation, L.R. Yegge Company, and Lawrence R. Yegge, Plaintiffs-Appellants, v. Mitsui & Company (U.S.A.), Inc., Mitsui Bussan Kabushiki Kaisha, VSL Corporation, Shinko Wire Co., and Losinger AG, Defendants-Appellees. No. 87-2556.

Filed: September 27, 1988
Amended: October 24, 1988

Appeal From The United States District Court For The Northern District of California (D.C. No. CV-87-1010 MHP).

Before PREGERSON, BOOCHEVER and BEEZER, Circuit Judges.

BOOCHEVER, Circuit Judge.

Conmar Corp. et al. (Conmar) appeal from the district court's grant of summary judgment to defendants Mitsui & Co. et al. (Mitsui). The district court found that there was no genuine issue of material fact that the four-year statute of limitations had run on Conmar's antitrust claim against Mitsui. We reverse.

#### FACTS

Conmar and L.R. Yegge Co. are contractors who post-tension concrete. Lawrence R. Yegge is the president of both companies. To obtain greater strength and improved structural characteristics, concrete is post-tensioned after the poured concrete is hardened by stretching previously inserted steel wire strands (PC-strand). Defendants Mitsui and Mitsui Bussan Kabushiki Kaisha import into the

United States products that defendant Shinko Wire Co. manufactures, including PC-strand. Defendant VSL Corp. is a competitor of Conmar and a wholly-owned subsidiary of defendant Losinger AG.

In December 1980, United States custom agents seized Mitsui records and a federal grand jury was impaneled in the Northern District of California to investigate possible customs violations. Mitsui allegedly was "dumping" steel products, i.e. importing them at below fair market value, in part by using false customs reports. News coverage in early 1981 of these events included three articles in the San Francisco Chronicle, one of which specified PC-strand as one of the products involved. Also reporting the investigation were two Wall Street Journal articles. One of these mentioned that PC-strand was involved, and that records of sales to VSL were being sought in the search. Single articles appeared in the Los Angeles Times and the New York Times. Major wire services also carried the story.

On March 23, 1981, the affidavit by Customs Agent Thomas Yasueda, which had been the basis for a warrant to search Mitsui's San Francisco office, was unsealed. The district court redated the affidavit to exclude the names of American companies and employees. Yasueda alleged that Mitsui imported nearly $33 million worth of PC-strand in 1977-1979 and engaged in a complicated scheme to dump PC-strand by splitting with the customer the difference between nominal and actual exchange rates, then falsely reporting the rates to the Customs Service. Reports of the unsealing of the affidavit included two articles in the San Francisco Chronicle, in one of which a Mitsui executive characterized the investigation as "based on a distortion or misunderstanding of the facts and a misinterpretation of anti-dumping regulations."

The Los Angeles Times carried a brief report of the affidavit's release and Mitsui's reaction. The New York Times reported the story, as did Business Week and the San Jose Mercury-News. None of these articles mentioned PC-strand. Wire services carried the story.

Later that year, on June 30, 1981, Pacific Steel & Supply Co., a Mitsui customer, was indicted for falsifying customs documents to mask the alleged dumping of Japanese steel nails. The indictment received news coverage in the San Francisco Chronicle (2 articles), the Wall Street Journal, the New York Times, and wire services. An antitrust suit was filed in the Northern District of California against Pacific Steel and Mitsui less than a month later, alleging that the illegal purchases of steel nails at prices below those reported were part of a conspiracy to monopolize the market.

In January 1982, VSL and one of its employees pled guilty to charges of aiding and abetting Mitsui in filing false customs declarations regarding the true price of PC-strand VSL bought from Mitsui. At least one paper reported the guilty plea.

On July 20, 1982, a fifty-nine page indictment issued charging Mitsui with violating customs reporting laws. The indictment charged that Mitsui and several of its employees conspired to defraud the United States by filing false customs entry forms to avoid the application of anti-dumping laws. Mitsui was alleged to have used false damage claims, false cancellation penalties, false secret commission payments, and undisclosed yen/dollar exchange payments. The indictment named VSL as a purchaser receiving from Mitsui PC-strand which was reported to customs at falsely inflated prices, and in eight pages detailed the methods used. The indictment did not

suggest that Mitsui or VSL intended to give VSL a price advantage over its competitors.

Two lawsuits were filed in October and December of 1982 based on information in the indictment, alleging antitrust violations based on Mitsui's dumping of steel products. After a visit in January 1986 from an attorney in the latter case, Conmar filed suit on Monday, July 21, 1986, four years after the issuance of the Mitsui indictment. Conmar's second amended complaint alleged that VSL obtained PC-strand from Mitsui at illegally low prices in a conspiracy to violate dumping laws, and that the low prices allowed VSL to submit low bids for post-tensioning jobs, with the intent of suppressing competition in the industry, again in conspiracy with Mitsui. Conmar also alleged that the anticompetitive acts were "by their very nature designed to conceal themselves from detection" and that defendants "actively, fraudulently and successfully concealed the existence of their agreements, conspiracies, and anti-competitive conduct" by submitting false documents, invoices, and customs forms, as well as by altering others, as described in the Mitsui indictment.

On April 27, 1987, Mitsui moved to dismiss the lawsuit for failure to state a claim and for summary judgment on the ground that the four-year statute of limitations had run. After a hearing on June 5, 1987, the district court ruled from the bench that summary judgment would be granted, and issued its order on July 28, 1987.

## ANALYSIS

We review de novo the district court's grant of summary judgment. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 629 (9th Cir. 1987). Where the moving party has identified the portions of the material

before the court that it claims shows the absence of any genuine issue of fact, the nonmoving party must set forth by affidavit or otherwise specific facts demonstrating that there is a genuine issue for trial. *Id.* at 630. The evidence must be viewed, and inferences from the evidence must be drawn, in the light most favorable to the nonmoving party. *Id.* at 630-31.

[1] Antitrust actions under the Clayton Act are subject to a four-year statute of limitations. 15 U.S.C. § 15b (1982). Conmar concedes that it filed its action more than four years after the activities that form the basis for its complaint of antitrust conspiracy, but contends that fraudulent concealment by Mitsui tolled that statute of limitations.

To toll the statute of limitations under this theory, Conmar must do more than show that it was ignorant of its cause of action. It must prove that Mitsui "fraudulently concealed the existence of the cause of action so that [Conmar], acting as a reasonable person, did not know of its existence." *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1299, 1302 (9th Cir.), *cert. denied*, 107 S. Ct. 279 (1986). Conmar carries the burden of pleading and proving fraudulent concealment; it must plead facts showing that Mitsui affirmatively misled it, and that Conmar had neither actual nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts. *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978). Conclusory statements are not enough. Conmar must plead with particularity the circumstances of the concealment and the facts supporting its due diligence. *Id.* at 250. The district court may grant summary judgment if uncontroverted evidence "irrefutably demonstrates that a plaintiff discovered or should have

discovered [the cause of action] but failed to file a timely complaint." *Volk v. D.A. Davidson & Co.,* 816 F.2d 1406, 1417 (9th Cir. 1987).

Conmar's second amended complaint alleged that Mitsui concealed its anticompetitive behavior by the elaborate scheme of false documentation and secret payments described in the July 1982 indictment of Mitsui for customs violations. To support its contention that it acted with due diligence in attempting to discover its cause of action, it submitted in opposition to the summary judgment motion a seven-page declaration of Lawrence R. Yegge, Conmar's president, detailing his business life and habits and specifying that he had not read any of the newspaper articles nor known of Mitsui's legal troubles until sometime after the indictment. Mitsui was not a Conmar supplier, and Conmar's counsel informed the court that Yegge did not know that Mitsui supplied VSL with PC-strand.

The central question, however, is not whether Conmar had actual knowlege of its antitrust cause of action, but whether before June 20, 1982, it should have been alerted to facts that, following duly diligent inquiry, could have advised it of its claim. *See Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389, 394 (6th Cir. 1975) ("Any fact that should excite his suspicion is the same as actual knowledge of his entire claim."). Mitsui argues that Conmar itself has answered that question in the affirmative by conceding that the Mitsui indictment provided sufficient information for constructive knowledge of its claim. Mitsui claims that prior to the filing of the indictment, all the information it contained was in the public domain. It concludes that Conmar has thus admitted that there was enough to put it on inquiry outside the limitations period.

Mitsui points to the amended complaint, but there Conmar stated that it did not discover the facts underlying its cause of action "until *sometime after* MITSUI (U.S.A.) and certain individual employees of MITSUI (U.S.A.) and MITSUI (Japan) were indicted on or about July 20, 1982" (emphasis added). Mitsui also relies on Conmar's mention of VSL's and Mitsui's 1982 guilty pleas and Conmar's filing of its complaint four years to the day after the Mitsui indictment. Yet Conmar's mention of the pleas in its complaint does not constitute an admission that these pleas put it on constructive notice of its claim, nor does its filing of the complaint four years after the indictment concede that it learned of its cause of action when the indictment was filed.

Mitsui repeated this assertion at the hearing on summary judgment. Conmar did not directly contest it, except to say that its complaint was within the statute of limitations from the date of the indictment, which Mitsui characterized as a "concession . . . that it was that indictment which started the statute running." The court seemed to rely on this, asking whether the June 1981 Pacific Steel indictment was substantially similar and then concluding that the "means of knowledge was certainly available by at least June of 1981." The court then found that Yegge had not met the standard for due diligence in investigating his claim after that date. The court's further discussion of his due diligence after the Mitsui indictment is irrelevant to the issue of due diligence prior to commencement of the statutory period.

[2] We find that Conmar did not concede that the 1982 Mitsui indictment put it on constructive notice of its claim. We therefore must decide whether there exist genuine questions of material fact whether: information before the Mitsui indictment was enough to put Conmar

on notice, Conmar exercised due diligence in trying to uncover its claim, and any absence of facts sufficient to put Conmar on notice was the result of fraudulent concealment by Mitsui.

A. Constructive Notice

[3] The information available before the Mitsui indictment consisted mainly of news coverage of the customs investigation of Mitsui for dumping steel products. Only one San Francisco Chronicle article mentioned PC-strand, as did one Wall Street Journal article, which also mentioned that sales to VSL were being investigated. Although wire service stories also mentioned PC-strand Mitsui produced no evidence that any newspaper carried the stories. The only mention of VSL's January 1982 guilty plea to aiding and abetting the filing of false customs declarations was in an article identified in an affidavit as a Wall Street Journal article, undated and unlocated as to page. Although the Yasueda affidavit detailed Mitsui's dumping of PC-strand, it contained no reference to VSL, and the news articles reporting it made no mention of VSL or PC-strand.

The June 1981 indictment relied on by the district court charged a Mitsui customer with falsifying customs documents to mask the dumping of steel nails. A competitor filed an antitrust suit a month later; no news coverage of the latter was alleged or produced.

[4] Cases refusing to toll the statute of limitations for fraudulent concealment have required more to find as a matter of law that sufficient facts were available to put the plaintiff on notice of his or her claims. In *Volk*, this court found that investors who received an annual report and a letter detailing the limited partnership's investments could not toll the statute of limitations for fraud,

because the document made it clear that they had paid more for their investment than it was worth. 816 F.2d at 1417. In *Rutledge,* a claim of fraudulent concealment failed where the plaintiff had litigated similar issues in an earlier case and had expressed suspicions about the defendants' wrongdoing. 576 F.2d at 250.

Other circuits have reached similar results. *See, e.g., Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211, 218 (4th Cir. 1987) (where antitrust action alleged interrelationships between defendant companies, and those interrelationships were readily discoverable on consultation of public mining records, no fraudulent concealment); *United Klans of America v. McGovern,* 621 F.2d 152, 154-55 (5th Cir. 1980) (claim of fraudulent concealment defeated by evidence of press conference receiving national coverage including television coverage, express mention of plaintiff as subject of probe, coverage in two local newspapers, Senate report about the program, and notice by letter to president of plaintiff that he may have been target of investigation); *Dayco,* 523 F.2d at 394 (congressional hearings on same antitrust violations complained of by plaintiffs and industry-wide publicity of FTC suit should have aroused plaintiff's suspicions; no fraudulent concealment).

The district court relied heavily on *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979), *cert. denied,* 449 U.S. 905 (1980). Yet that case concluded that summary judgment was inappropriate even where the defendant has demonstrated that the plaintiff should have known of some information arousing his inquiry. The Fifth Circuit held that where plaintiffs knew or should have known of a similar antitrust complaint due to widespread industry publicity, this was "not *as a matter of law* tantamount to actual or constructive knowledge of their

claim" without awareness of "some evidence tending to support it." *Id.* at 1171 (emphasis in original).

In *Robuck* we upheld as not clearly erroneous a finding *after trial* that there was no fraudulent concealment where an investor claiming fraud received monthly statements of his accounts and had access to daily newspaper reports of the trading values of his securities. We indicated that there were conflicting inferences to be drawn from the record. *Robuck v. Dean Witter & Co.,* 649 F.2d 641, 643, 644 (9th Cir. 1980). Summary judgment would therefore have been inappropriate.

[5] Mitsui also argues that Conmar was aware of VSL's growth and a corresponding decrease in competition, and so should have been alerted to antitrust claims by the customs violations information. The sources Mitsui cites — Conmar's complaint and Yegge's declaration — do not in any way indicate that Conmar was aware of these trends *before* June of 1982. Conmar also asserts that it was not aware that Mitsui supplied VSL.

[6] Mitsui further points to other antitrust complaints filed before Conmar's as evidence that Conmar should have been on notice of its claim. The district court judge had presided over each of these cases. Only one of the complaints was filed before the 1982 Mitsui indictment, and appellants produced no media coverage of its filing. That complaint was based on the June 1981 Pacific Steel indictment and involved steel nails. Its existence, even had Conmar known of it, would not, as a matter of law, lead to the conclusion that Conmar should have filed a similar suit. First, it was not publicized. *See Beef Industries,* 600 F.2d at 1170 (plaintiffs knew or should have known of widely publicized antitrust complaint). Even if Conmar were charged with knowledge of it because it was a matter of public record, *see id.,* that knowledge would

not necessarily justify the filing of a complaint, and so the issue of whether the statute of limitations was tolled would be inappropriate for summary judgment. "The leap from the plaintiffs' knowledge of the . . . complaint to actual or constructive knowledge of their cause of action therefore involves factual issues . . . . [A]n inference that the plaintiffs would have discovered adequate support before [the start of the limitations period] had they been reasonably diligent. . . . is not so compelling as to entitle the defendants to summary judgment." *Id.* at 1171.

We find there was a genuine issue of material fact whether information available before June of 1982 was enough to put Conmar on notice of its antitrust claim and start the limitations period.

B. Due Diligence

Where a plaintiff's suspicions have been or should have been excited, there can be no fraudulent concealment where he "could have then confirmed his earlier suspicion by a diligent pursuit" of further information. *Rutledge,* 576 F.2d at 250. The requirement of diligence is only meaningful, however, when facts exist that would excite the inquiry of a reasonable person. *See Volk,* 816 F.2d at 1416 (where investors received annual report that should have alerted them to fraud, no due diligence when they subsequently failed to investigate); *Dayco,* 523 F.2d at 394 (where facts exist that should have excited plaintiff's suspicion, plaintiff must show what steps it took to establish due diligence).

Mitsui claims that due diligence is irrelevant when the facts putting the plaintiff on notice are in the public domain. This is incorrect. The due diligence Conmar must show is its attempts to uncover its claim from those facts, if indeed they were sufficient to excite suspicion.

[7] The district court found that Conmar's duty to exercise due diligence began in June of 1981, and that Conmar failed to exercise such diligence. The record does not show any inquiry by Conmar after that date. However, because we find that there is a genuine issue of material fact whether the facts publicly available were sufficient to excite Conmar's inquiry, then no due diligence need be demonstrated for Conmar to survive summary judgment. It is irrelevant whether Conmar was diligent in pursuing its possible claims after the filing of the Mitsui indictment in July of 1982, because no due diligence is required within the limitations period.

C. Fraudulent Concealment

Conmar claims that Mitsui's acts constitute fraudulent concealment because they were by nature self-concealing. We require more. A plaintiff alleging fraudulent concealment must establish that its failure to have notice of its claim was the result of affirmative conduct by the defendant. *Volk*, 816 F.2d at 1415. *See Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988); *Hill v. Texaco*, 825 F.2d 333, 335 (11th Cir. 1987); *but see State of New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) (enough for fraudulent concealment that conspiracy was by nature self-concealing); *King & King Ent. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981) (active concealment and self-concealing conduct enough for fraudulent concealment) *cert. denied*, 454 U.S. 1164 (1982).

Passive concealment of information is not enough to toll the statute of limitations, *Volk*, 816 F.2d at 1416, unless the defendant had a fiduciary duty to disclose information to the plaintiff. *Rutledge*, 576 F.2d at 250. An affirmative act of denial, however, is enough if the circum-

stances make the plaintiff's reliance on the denial reasonable. *Id.*

[8] Conmar's amended complaint charges that Mitsui affirmatively acted to conceal its anticompetitive behavior by creating customs and other documents falsely reporting prices for PC-strand. A jury could believe that the filing of false customs forms was affirmative conduct sufficient for a finding of fraudulent concealment which prevented Conmar from being alerted to the manipulation of PC-stand prices. In addition to the false customs forms, Conmar identifies as the affirmative conduct necessary for fraudulent concealment Mitsui's statements in the press, following the unsealing of the Yasueda affidavit, that the investigation was based on misundertanding and misinterpretation of customs regulations. Under the circumstances of this case, it would not have been unreasonable for Conmar to rely upon Mitsui's contention that the customs investigation was a mistake. This is not a situation in which Mitsui simply "fail[ed] to own up to illegal conduct upon [a] . . . timid inquiry [from the already suspicious plaintiff]," *Pocahontas*, 828 F.2d at 218, but rather a direct public denial of any wrongdoing before sufficient facts existed to make Conmar suspicious. *Cf. Rutledge*, 576 F.2d at 250 (because plaintiff was already suspicious, his reliance on defendant's denial of price discrimination was not reasonable).

[9] Mitsui replies that once the information was in the pubic domain, fraudulent concealment of that information was impossible, and that with the filing of the *Pacific Steel* indictment in June of 1981, Mitsui's customs violations were a matter of public record. It is true that "[w]hen the claim is one of concealment and the very facts allegedly concealed are available in public records, the argument that the plaintiffs should, as a matter of law, be held to

constructive knowledge of their cause of action is much stronger." *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1388 (10th Cir. 1985). The facts made public in *Pacific Steel*, however, involved steel nails and no competitor of Conmar's. That Mitsui had committed customs violations with this customer and this steel product was not enough to alert Conmar to its possible antitrust claims. The facts that could serve as a basis for its claim were still concealed from Conmar and not a matter of public record.

We find there was a genuine issue of material fact as to whether the lack of adequate information was due to Mitsui's fraudulent concealment.

## CONCLUSION

Summary judgment refusing to find fraudulent concealment to toll the statute of limitations was inappropriate. We conclude that there were genuine issues of material fact whether information available before July of 1982 was enough to put Conmar on constructive notice of its claim, and whether the lack of information was due to Mitsui's fraudulent concealment so as to toll the statute of limitations. We therefore REVERSE the summary judgment.

## APPENDIX B.

### District Court's Ruling

In the United States District Court for the Northern District of California.

Conmar Corporation, L.R. Yegge Co., and Lawrence R. Yegge, Plaintiffs, v. Mitsui & Company (U.S.A.), Inc. Mitsui Bussan Kabushiki Kaisha, VSL Corporation, Inc., Shinko Wire Co., Ltd., and Losinger A.G., Defendants. No. C-87-1010 MHP.

Order Granting Motion of Defendants Mitsui, MBK, and VSL For Summary Judgment. Filed July 28, 1987.

MARILYN HALL PATEL, District Judge.

The motion of defendants Mitsui & Co. (U.S.A.), Inc., Mitsui Bussan Kabushiki Kaisha, VSL Corporation, and Shinko Wire Co., Ltd. to dismiss the First through Fourth causes of action of plaintiffs' Second Amended Complaint as to plaintiffs Conmar Corporation, Lawrence R. Yegge, and L.R. Yegge Co., on the ground that the claims stated therein are barred by the statute of limitations, came on for hearing on June 5, 1987. Appearances were entered by Robert A. Susk on behalf of plaintiffs, by Michael C. Kelley of Kadison, Pfaelzer, Woodard, Quinn & Rossi on behalf of VSL Corporation, by Gregory S. Gilchrist of Heller, Ehrman, White & McAuliffe on behalf of Shinko Wire Co., Ltd., and James L. Hunt and Alfred C. Pfeiffer, Jr., of McCutchen, Doyle, Brown & Enersen on behalf of Mitsui & Co. (U.S.A.), Inc., and Mitsui Bussan Kabushiki Kaisha. Defendants' motion to dismiss was treated as a motion for summary judgment, because the record contained substantial matters outside the pleadings.

With respect to that motion, even resolving all factual disputes in favor of plaintiffs, as the Court must do, the Court's ruling is apparent. Plaintiff's action is governed by a four year statute of limitations. That statute began to run no later than the date of the first Mitsui indictment in June 1981. The statute may have begun to run even earlier, given the publicity and the public disclosure of the Yasueda search warrant in March 1981.

The burden is on plaintiffs to prove fraudulent concealment, and that burden is a heavy one. The question is when a reasonable person under similar circumstances would have learned or been put on notice that he may have some basis for a claim and had a duty to investigate. The case of *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), is instructive. It held that the means of knowledge are the same thing as knowledge itself. This is an objective standard, and is not dependent on a particular plaintiff's level of actual knowledge.

What was available in the *In re Beef Industry* case was a complaint in another action. Here, there was much more available information, including many matters of public record. Many of these were documents filed with this Court and are therefore judicially noticeable material, such of the Yasueda affidavit, which was as complete as any of the subsequent indictments, the June 1981 indictment and the Ninth Circuit opinion concerning that indictment, the VSL guilty plea in January 1982, and the July 1982 indictment. This body of available information should have put a reasonable person, and plaintiffs, on notice and should have "excited their inquiry."

In addition, other lawsuits were filed within the statutory period, including *Dealers Wholesale Supply, Inc. v. Mitsui & Co. (U.S.A.), Inc.*, No. C 81-3038 MHP (filed July 20, 1981), *Kaiser Steel Corp. v. Mitsui & Co. (U.S.A.),*

*Inc.*, No. C 82-5939 MHP (filed October 27, 1982), and *Western Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc.*, No. C 82-6628 MHP (filed December 3, 1982), which suggests that all of those parties had their inquiries sufficiently "excited" to file timely actions. Plaintiffs' argument that the 1981 indictment information was not sufficient to put them on notice is not persuasive; it was obviously sufficient for the plaintiffs in these other actions one of which makes exactly the same claims as those here.

The means of knowledge were certainly available to plaintiffs by at least June of 1981, and that is the equivalent of actual knowledge. Plaintiff is charged with knowledge of public records, as is clear from both *In re Beef Industry* and *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985). *Maughan* also held that where fraudulent concealment is claimed, and the facts allegedly concealed are in fact available in public records, the argument that plaintiffs should, as a matter of law, be held to constructive knowledge of their claims is much stronger. Indeed, the facts allegedly concealed were available in public records in this case.

Under Rule 56 of the Federal Rules of Civil Procedure, and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), once a motion for summary judgment is made, the party who has the burden of proof on a particular issue at trial cannot sit back, but must come forward with evidence to establish the existence of the essential elements that they must prove at trial, in this case, that they acted with due diligence. Because the question of due diligence is not a matter uniquely within defendants' control, it is an appropriate issue for summary judgment.

Even resolving all factual disputes in plaintiffs' favor, plaintiffs do not meet the standard for due diligence

described in the *In re Beef Industry* case, nor do they even create any disputes of fact. What *In re Beef Industry* establishes is that the widely publicized complaint in that case was sufficient to put those plaintiffs on a duty to investigate. They bore the burden of demonstrating to a trier of fact that they investigated with reasonable diligence and discovered nothing that would have justified their filing suit earlier.

In this case, the statute of limitations would have run no later than June of 1985. Mr. Yegge admits some knowledge of the Mitsui indictment back in 1982. He does not state that he made any inquiry or investigation to find our whether he had a cause of action. Rather, Mr. Yegge stated that he sat back and waited until M . Spensley, counsel for plaintiff Western Concrete in the action entitled *Western Concrete Structures Co., Inc. v. Mitsui & Co. (U.S.A.), Inc.,* No C 82-6628 MHP (N.D. Cal., filed December 3, 1982), came to him and advised him that he had filed a lawsuit. That was not until 1986. Mr. Yegge's declaration does not contain any evidence of the kind of facts necessary to persuade a trier of fact that due diligence was used, in order to meet the standard of *In re Beef Industry* and the other cases that deal with fraudulent concealment.

Accordingly, defendants' motion for summary judgment on the issue of the statute of limitations is GRANTED.

IT IS SO ORDERED.

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party in the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 10, 1988, I served the within Petition for Writ of Certiorari in re: "Conmar Corporation vs. VSL Corporation, Inc." in the United States Supreme Court, October Term 1988;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Robert A. Susk
Law Office of Robert A. Susk
101 California Street
Suite 4450
San Francisco, California 94111

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on November 10, 1988, at Los Angeles, California

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